FILED
JAN 22 1993
OFFICE OF THE CLERK

No. 92-479

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

TXO PRODUCTION CORP.,

Petitioner,

—v.—

ALLIANCE RESOURCES CORP., THE TUG FORK LAND COMPANY, GEORGE KING, and GROVER C. GOODE,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

BRIEF OF THE SECURITIES INDUSTRIES ASSOCIATION, INC., AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

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Respondents.

BRIEF OF THE SECURITIES INDUSTRIES ASSOCIATION, INC., AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

PRELIMINARY STATEMENT

The Securities Industries Association, Inc. ("SIA"), submits this brief as *amicus curiae* in support of the petitioner and urges this Court to reverse the opinion and judgment of the Supreme Court of Appeals of West Virginia below in *TXO Production Corp.* v. *Alliance Resources Corp.*, 187 W. Va. 457, 419 S.E.2d 870 (1992). Pursuant to Rule 37.3 of the Rules of this Court, the written consent of petitioner TXO Production Corp. and of respondents Alliance Resources Corp., The Tug Fork Land Company, George King, and Grover C. Goode

has been obtained and has been filed with the Clerk of the Court.

INTEREST OF *AMICUS CURIAE*

SIA is the principal trade association of the securities industry, having as members more than 650 securities firms in the United States and Canada. As such, it has a substantial interest in ensuring that any award of punitive damages be the product of fair and impartial rules and proceedings, as is embodied in the concept of due process of law under the Fifth and Fourteenth Amendments to United States Constitution. Many of SIA's members are involved in litigation in which punitive damages are sought. The outcome of this case will have a direct bearing upon whether those claims will be adjudicated impartially and under objective standards or whether those claims will continue to offer an opportunity for an economic windfall—an especially unfair outcome in a commercial setting—based on the caprice of a particular fact finder. SIA seeks to clarify the law on this issue—both as to the procedural requirements for the imposition of punitive damages and as to the scope of punitive damages themselves. Clarification of those two issues will better enable lower courts to apply due process in connection with punitive damage claims and give fair notice to litigants, and the general public as well, of the potential liability for conduct that is subject to punitive damages.

SUMMARY OF ARGUMENT

The opinion of the West Virginia Supreme Court of Appeals below, *TXO Production Crop.* v. *Alliance Resources Corp.*, 187 W. Va. 457, 419 S.E.2d 870 (1992), upholding in a commercial litigation a punitive damage award of $10 million in comparison with an actual damage award of $19,000, manifests a judicial bias against petitioner and a disregard of due process of law. The opinion below flies in the face of this Court's requirement in *Pacific Mutual Life Insurance Co.* v. *Haslip*, ____ U.S. ____, 111 S. Ct. 1032, 1045-46 (1991), that an award of punitive damages be "not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages," 111 S. Ct. at 1045, and that it reflect "objective criteria." 111 S. Ct. at 1046. The award below demonstrates an utter lack of "fundamental fairness . . . [and] the rationality that is an essential component of that fairness." *Schad* v. *Arizona*, ____ U.S. ____, 111 S. Ct. 2491, 2501 (1991).

In affirming a $10 million award that was 500 times the amount of actual damages, in employing an analysis as to whether the conduct of petitioner was "really stupid" or "really mean," 419 S.E.2d at 887 (a test that two concurring Justices of that court termed "ridiculous," 419 S.E.2d at 896 (McHugh, C.J., concurring)), and in refusing to find any limitation at all in the amount of punitive damages that may be assessed against "really mean" conduct, the West Virginia Supreme Court defied this Court to enforce the rule of *Haslip* while purporting to pay lip service to that case. The decision below also affirmed a summary denial of a motion for judgment notwithstanding the verdict by the trial court and

affirmed the admission of evidence of unrelated "bad acts" of petitioner, irrelevant and prejudicial evidence that can only have served to deprive petitioner of due process. That prejudice was further exacerbated in that the only criterion apparently used to measure the amount of punitive damages was the net worth of petitioner's corporate parent. The analysis and the result below in fact present a stark example of the very danger that this Court warned against in *Haslip*—"punitive damages that 'run wild.' " 111 S. Ct. at 1043. This Court should accordingly leave no room for trifling with the requirements of due process in connection with claims for punitive damages by setting forth in clear and unmistakable terms what due process requires.

POINT I

THE DECISION BELOW DEPRIVED PETITIONER OF DUE PROCESS OF LAW

Because the award of punitive damages below as affirmed by the West Virginia Supreme Court manifestly failed to apply due process of law as required by the Constitution, that decision should be reversed. As applied to acts of criminal punishment, due process reflects the fundamental constitutional policy that any punishment imposed by a state or by the United States be based upon the conduct of a person, not on the basis of the identity of that person. Thus, criminal punishments are required to be set by statute, and a criminal defendant is entitled to numerous procedural safeguards meant to ensure a fair and unbiased trial—such as the right to be informed of criminal charges, the right to be indicted by a grand jury, the right to conviction on the

basis a unanimous jury verdict based on evidence beyond a reasonable doubt. As Justice Black observed in holding *ex parte* judicial contempt proceedings unconstitutional in *In re Murchison*, 349 U.S. 133, 136 (1955):

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness.

349 U.S. at 136.[1]

As this Court recognized in *Pacific Mutual Life Insurance Co.* v. *Haslip*, ____ U.S. ____, 111 S. Ct. 1032 (1991), the concept of due process applies to claims for punitive damages and requires that any award of punitive damages manifest that it was based on "objective criteria." 111 S. Ct. at 1046.[2] This Court in *Haslip*

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[1] This policy is also reflected in the constitutional prohibitions against bills of attainder and *ex post facto* laws. U.S. Const. Art. 1, §§ 9, 10. As the Court held in *Hurtado* v. *California*, 110 U.S. 516, 535-36 (1884):

> Law is something more than mere will exerted as an act of power. It must not be a special rule for a particular person or a particular case, but . . . 'the general law . . .' so that 'every citizen shall hold his life, liberty, property and immunities under the protection of the general rules of society,' and thus excluding, as not due process of law, acts of attainder, bills of pains and penalties, acts of confiscation . . . and other special, partial and arbitrary exertions of power . . . .

110 U.S. at 535-36.

[2] Although awarded in the context of a civil proceeding, punitive damages constitute an act of punishment by the United States and its courts or of the states and their courts. As the New York Court of Appeals held in prohibiting an award of punitive

affirmed an award by an Alabama jury of punitive damages in an amount of approximately four times the amount of actual damages sustained. 111 S. Ct. at 1037 n.2. The Court noted the detailed "post-trial procedures for scrutinizing punitive awards" in Alabama, 111 S. Ct. at 1044, including the analysis of such factors as the culpability of the conduct involved and also that, under Alabama law, the trial court was required to "reflect in the record the reasons" for its decision on any post-trial motion directed at a punitive damage award. Moreover, under the applicable procedures, the Alabama Supreme Court was required to review an award of punitive damages based on "a comparative analysis" as well as consideration of factors such as the amount of harm caused by the defendant's conduct, the degree of reprehensibility, whether the defendant was subject to criminal sanctions, the profitability of the wrongful conduct to the defendant, and the financial position of the defendant. 111 S. Ct. at 1042. That substantive review on both the trial and appellate level satisfied this Court that "punitive damage awards [in Alabama] are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages." 111 S. Ct. at 1045. As a result, although "the monetary comparisons [between the award of punitive

damages by an arbitrator in *Garrity* v. *Lyle, Stuart, Inc.*, 40 N.Y.2d 354, 359-60, 386 N.Y.S.2d 831, 834 (1976):

> In imposing penal sanctions in private arrangements, a tradition of the rule of law is violated. One purpose of the rule of law is to require that the use of coercion be controlled by the State . . . . For centuries, the power to punish has been a monopoly of the State, and not of any private individual . . . . The day is long past since barbaric man achieved redress by private punitive measures.

40 N.Y.2d at 359-60, 386 N.Y.S.2d at 834.

damages and the amount of compensatory damages and out-of-pocket loss] are wide and indeed may be close to the line, the award here did not lack objective criteria." 111 S. Ct. at 1046.[3]

The West Virginia Supreme Court below did not begin to apply due process in the manner required under *Haslip*. In sharp distinction with the Alabama procedures that this Court approved in *Haslip*, the trial court in this case summarily denied petitioner's motion for judgment notwithstanding the verdict. Appendix to Petition for writ of *certiorari* at 72a. The West Virginia Supreme Court, far from engaging in the sober analysis approved by this Court in *Haslip*, manifested undisguised bias against corporations with such observations as "the threat of litigation is good news to the middle management employees who make many of the day-to-day decisions for large corporations," 419 S.E.2d at 888, followed by a superficial analysis that displayed the flippancy of that Court towards the notion of affording due process to corporate defendants.[4] Specifically, after noting that "we can distinguish between the 'really mean' punitive damages defendant, and the 'really stupid' punitive damages defendant," 419 S.E.2d at 887, and holding that, for "really stupid" defendants, "the outer limit of punitive damages is *roughly* five to one," 419 S.E.2d at 889 (emphasis in the original), the Supreme

[3] The out-of-pocket loss sustained by the plaintiff in *Haslip* was less than $4,000, 0.5 % of the punitive damages awarded. 111 S. Ct. at 1037 n.2.

[4] The concurring opinion below sought to explain the tone of the majority opinion as "a cavalier attempt to be clever and amusing." 419 S.E.2d at 895 (McHugh, C.J., concurring).

Court of West Virginia refused to set any limitation on the amount of punitive damages in "really mean cases" and held that "even punitive damages 500 times greater than compensatory damages are not *per se* unconstitutional . . . . " 419 S.E.2d at 889.

Two further evidentiary errors compounded the prejudice against petitioner. In their effort to paint petitioner as "really mean," the courts below admitted evidence of unrelated "bad acts"—including opinion testimony by an attorney " 'that TXO had violated the rights of . . . hundreds or thousands of other people across the nation . . . ' " based on court documents filed in Oklahoma in an action in which petitioner won a jury verdict. 419 S.E.2d at 882-83. The West Virginia Supreme Court greeted that verdict—and the fact that that verdict disproved the attorney's opinion and rendered the introduction of that opinion into evidence highly prejudicial—with the judicious observation, "Well, even a blind hog finds an acorn now and then." 419 S.E.2d at 884 n.9.

Moreover, the courts below admitted expert testimony that the net worth of petitioner's corporate parent, the TXO division of USX Corporation, was between $2.2 and $2.5 billion into evidence. 419 S.E.2d at 890. That evidence can only have served to inflate the punitive damage award based on prejudice against petitioner. Given the remarks of the West Virginia Supreme Court about large corporations, the award must surely reflect prejudice against large or wealthy corporations, which disproves that petitioner received due process below.[5]

[5] As noted below at 17-19, courts often consider the net worth of a defendant in assessing punitive damages, a fact noted by Justice Brennan in his concurring opinion raising the due process issue in *Browning-Ferris Industries* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 280-82 (1989). Due process requires, however, that a defendant's net worth not be the only factor used to measure punitive damages and that care be taken to avoid the possibility of jury prejudice against a wealthy defendant.

That litigants often try to use a defendant's wealth in order to prejudice a jury against that defendant cannot be ignored. For example, in *Robertson Oil Co.* v. *Phillips Petroleum Co.*, 930 F.2d 1342, 1346 (8th Cir. 1991), an expert witness testified to the jury "as to what size punitive award would comparable to a $2, $100 or $1,000 award against a 'common worker' "—a clear invitation to exercise prejudice against a corporate defendant. The Court in *Laughinghouse* v. *Risser*, 786 F. Supp. 920, 928 (D. Kan. 1992), overruled an objection to a $600,000 award of punitive damages notwithstanding that counsel for the plaintiff had stressed the net worth of the defendant corporation in his remarks to the jury. As noted in Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139, 146-47 (1986), "juries have a natural sympathy for injured persons and not infrequently a corresponding hostility to 'big business.' The notion that juror consideration of the multimillion, often multibillion, dollar figures on a corporate balance sheet would operate to protect such defendants against excessive liability is, in context, almost laughable." Due process entitles all parties including large corporations to an impartial hearing.

The refusal below to conduct a serious analysis of the punitive damages issue, the improper introduction of evidence prejudicial to petitioner, and the unmistakable hostility directed against petitioner and large corporations in general cannot stand under *Haslip*. Indeed, the amount of the award below—500 times the actual dam-

ages sustained by the plaintiff—alone should resolve any doubts that the West Virginia courts failed to provide due process to petitioner. If the award in *Haslip* came "close to the line," 111 S. Ct. at 1046, this case has gone far beyond that line.

POINT II

BECAUSE PUNITIVE DAMAGES HAVE "RUN WILD," THIS COURT SHOULD ARTICULATE THE DUE PROCESS REQUIREMENTS FOR PUNITIVE DAMAGE AWARDS

Although extreme, the decision below does not represent an isolated instance of punitive damages "run wild." In light of the substantial number of million dollar punitive damage awards, and the court cases either misreading or disregarding the message of *Haslip*, this Court should set forth the minimum requirements of due process in connection with the imposition of punitive damages.

Both in *Haslip* and in prior opinions, this Court has noted its concerns about punitive damage awards. In *Browning-Ferris Industries* v. *Kelco Disposal, Inc.*, 492 U.S. 257 (1989), the Court rejected a challenge to punitive damages as constituting "excessive fines" in violation of the Eighth Amendment but held open whether punitive damage awards satisfied due process on the ground that that question had not been properly raised. Four Justices of the Court, however, questioned the process of awarding punitive damages and the size and frequency of the awards. Justices Brennan and Marshall noted in a concurring opinion that, "without statutory (or at least common-law) standards for the determination of

how large an award is appropriate in a given case, juries are left largely to themselves in making this important, and potentially devastating, decision." 492 U.S. at 280-82. Justices O'Connor and Stevens in partial dissent observed that "awards of punitive damages are skyrocketing." 492 U.S. at 282-301. *See also Bankers Life & Casualty Co.* v. *Crenshaw*, 486 U.S. 71, 76-80 (1986) (O'Connor, J., concurring) (application of Due Process Clause to punitive damage awards raises a "serious" question); *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) (noting that "juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused").

Other courts and commentators have shared those concerns. In *Roginsky* v. *Richardson-Merrell, Inc.*, 378 F.2d 832, 839-41 (2d Cir. 1967), the Second Circuit (Friendly, J.) pointed out the catastrophic potential of unlimited awards of punitive damages in the context of mass-tort litigation. Noting that "If all recovered punitive damages in the amount here awarded these would run into tens of millions, as contrasted with the maximum criminal penalty of 'imprisonment for not more than three years, or a fine of not more than $10,000, or both . . . ,'" Judge Friendly expressed "the gravest difficulty in perceiving how claims for punitive damages in such a multiplicity of actions . . . can be so administered as to avoid overkill." 378 F.2d at 839. Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. at 144-46, in commenting on the frequency of multimillion dollar punitive damage awards, noted thirty-eight punitive damage awards in excess of $1 million in the State of California alone between 1983 and 1985, 72 Va. L. Rev. at 145, and cited an additional sixteen exam-

ples in reported decisions between 1980 and 1986. 72 Va. L. Rev. at 145 n.23.[6] According to Professor Jeffries, such results may "threaten the civil extinction of major business entities [and] . . . 'may fairly raise concern for the future stability of American industry.' " 72 Va. L. Rev. at 146 (quoting Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. Chi. L. Rev. 1, 6 (1982)).

Notwithstanding this Court's stated concerns about "skyrocketing" punitive damages and punitive damages "run wild," such awards continue. In *Jordan* v. *Clayton Brokerage Co.*, 975 F.2d 539, 542 (8th Cir. 1992), the Eighth Circuit affirmed an award of $400,000 in punitive damages for "churning" a commodities account that had sustained $7,900 in trading losses and paid $5,300 in excessive commissions. In *Burke* v. *Deere & Co.*, 780 F. Supp. 1225 (S.D. Iowa 1991), a jury awarded punitive damages of $50 million over conduct that had caused $600,000 in actual damages, which was remitted by the District Court to $28 million. *Mason* v. *Texaco Inc.*, 948 F.2d 1546 (10th Cir. 1991), *cert. denied*, ____ U.S. ____,

[6] The nature of the increase in punitive damages between in the last twenty years is graphically documented in Turner et al., *Punitive Damages Explosion: Fact or Fiction?*, Washington Legal Foundation, Critical Legal Issues, Working Paper Series No. 50 (November 1992), which was filed as a supplemental lodging to the brief of the American Petroleum Institute and the National Association of manufacturers as *amici curiae* in support of the Petition for a writ of *certiorari* herein. According to that study, punitive damage awards against businesses in California, Florida, Illinois, New York, and Texas increased from $1.1 million between 1968 and 1971 to $343 million between 1988 and 1991. As adjusted for inflation, those figures still reflect an 89-fold increase in constant dollars.

112 S. Ct. 1941 (1992), ordered remittitur of punitive damages to $12.5 million from a jury award of $25 million. *Davis* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 906 F.2d 1206, 1224-25 (8th Cir. 1990), affirmed a $2 million punitive damage award based upon unauthorized trading by an employee of Merrill Lynch, Pierce, Fenner & Smith, Incorporated, who had been terminated, notwithstanding that Merrill Lynch itself had "acted promptly to mitigate further harm after another customer complained of an improper trade" and that the plaintiff's account had actually made money during the period of the unauthorized trading. *See also Oberg* v. *Honda Motor Co.*, 814 P.2d 517 (Ore. App. 1991) (affirming award of $5 million in punitive damages as compared to $700,000 in actual damages);[7] *Commonwealth Lloyd's Insurance Co.* v. *Thomas*, 825 S.W.2d 135 (Tex. App. 1992) (awarding $2 million in punitive damages compared with $708,000 in actual damages); *Brown* v. *Petrolite Corp.*, 965 F.2d 38 (5th Cir. 1992) (affirming award of $700,000 in punitive damages in comparison with actual damages of $60,000).

The numerous cases in which courts have stricken or reduced large punitive awards by juries further underscores the need for guidance as to the constitutional limits on the scope of punitive damage awards. *Alexander & Alexander, Inc.* v. *R. Dixon Evander & Associates*, 596 A.2d 687, 88 Md. App. 672 (Md. App. 1991) (vacating $12.5 million damage award (which had been remitted from jury verdict of $40 million)); *Lightning Lube, Inc.* v. *Wilco Corp.*, 802 F. Supp. 1180 (D.N.J. 1992) (order-

[7] The jury awarded actual damages of $919,000, which the court reduced to $700,000 based on the jury finding that the plaintiff was 20% negligent.

ing new trial on evidence as to punitive damages after jury had awarded $50 million in punitive damages); *Tunis Brothers Co.* v. *Ford Motor Co.*, 952 F.2d 715 (3d Cir. 1991), *cert. denied*, ____ U.S. ____, 112 S. Ct. 3034 (1992) (vacating jury award of $4 million in punitive damages (compared to $227,000 in compensatory damages) in case involving termination of auto dealership); *Mosser* v. *Fruehauf Corp.*, 940 F.2d 77 (4th Cir. 1991) (affirming District Court decision to set aside $5.5 million dollar punitive damage award); *Machine Maintenance & Equipment Co.* v. *Cooper Industries*, 661 F. Supp. 1112 (E.D. Mo. 1987) (ordering *remittitur* on punitive damages to $100,000 from $10 million); *Toole* v. *McClintock*, 778 F. Supp. 1543 (M.D. Ala. 1991) (reducing punitive damages to $2 million from jury award of $5 million, in comparison to $350,000 in compensatory damages); *Burke* v. *Deere & Co.*, 780 F. Supp. 1225 ($50 million punitive damages award remitted to $28 million); *Jacobs Manufacturing Co.* v. *Sam Brown Co.*, 792 F. Supp. 1520 (W.D. Mo. 1992) (vacating $2.7 million punitive damages award in commercial dispute as based on passion and prejudice); *Medical Mutual Life Insurance Soc.* v. *R. Dixon Evander & Associates*, 92 Md. App. 551, 609 A.2d 353 (Md. App. 1992) (vacating and remanding $7 million punitive damage award in commercial case for explanation in light of *Haslip*); *Robertson Oil Co.* v. *Phillips Petroleum Co.*, 930 F.2d 1342 (vacating and remanding $8 million punitive damage award for analysis required under *Haslip*).

Those cases attest eloquently to the failure of jury instructions on punitive damages to offer any real guidance to juries. They reflect juries that have been "left largely to themselves" with the temptation to "run wild."

As the Fourth Circuit observed in *Mattison* v. *Dallas Carrier Corp.*, 947 F.2d 95, 105-06 (4th Cir. 1991):

> When a jury is left to its own devices to take property or mete out punishment to whatever extent it feels is best in the course of the process, our sensibilities about that process are offended. . . .
>
> If Congress were to enact a statute that provides that "anyone who wantonly or recklessly breaches an existing duty of law becomes subject to a penalty in an amount that the factfinder wishes to enter," consensus would readily be reached to strike it down for being vague and lacking meaningful standards.

947 F.2d at 105-06.

The continuing growth of extraordinary punitive damage awards stems in no small part from the failure of lower Courts to heed the fundamental message of this Court's decision in *Haslip*: that due process requires that any award of punitive damages be based on "objective criteria" and bear some relation to the amount of damage caused and the nature of the wrongful conduct to be punished. Notwithstanding that *Haslip* reaffirmed the disapproval expressed in prior cases of punitive damage schemes in which "an amount awarded would be set aside or modified only if it was 'manifestly and grossly excessive,' . . . or . . . when 'it evinces passion, bias and prejudice on the part of the jury so as to shock the conscience,' " 111 S. Ct. at 1045 n.10, courts continue to refuse to disturb jury awards of punitive damages absent a finding of "passion" or an abuse of discretion. For example, *Peoples Bank & Trust Co.* v. *Globe International, Inc.*, 786 F. Supp. 791, 802 (W.D. Ark. 1992),

applied a "passion and prejudice" standard and declined to reduce $850,000 punitive damage award because that award did not "shock the conscience of the court." In *K-Mart Corp.* v. *Pearson*, 818 S.W.2d 410, 416-17 (Tex. App. 1991), after the jury was instructed to award punitive damages "in your discretion" and that "you may consider [defendant's] net worth in determining what amount, if any would constitute a penalty," the court deferred to the jury's finding and noted that it "cannot say that the jury's award of $2,200,000 in exemplary damages is excessive."

In *Glasscock* v. *Armstrong Cork Co.*, 946 F.2d 1085, 1095-96 (5th Cir. 1991), *cert. denied*, ____ U.S. ____, 112 S. Ct. 1778 (1992), after holding without any analysis that the award of punitive damages was appropriate under a factor analysis set by the Texas Supreme Court, the Fifth Circuit further noted that the defendant had not "shown us that the total of the punitive damage award was the product of passion rather than reason." The Ninth Circuit in *Morgan* v. *Woessner*, 975 F.2d 629, 640 (9th Cir. 1992), reviewed a punitive damage award under 42 U.S.C. § 1983 (1992) under an abuse of discretion standard under *Browning-Ferris* and held that "we hardly think it clear that the Supreme Court intended *Haslip* to alter federal courts' review of punitive damages [under Section 1983]." *See also Commonwealth Lloyd's Insurance Co.* v. *Thomas*, 825 S.W.2d at 148-49 (holding that jury instruction satisfied due process requirements under *Haslip* and refusing to disturb jury award because "there was some evidence to support the jury's finding"); *Jordan* v. *Clayton Brokerage Co.*, 975 F.2d at 542 (under Missouri law, punitive damage award may be reduced or vacated only if it constitutes an

abuse of discretion and rejecting due process challenge to that standard because first raised on remand).

Juries further receive little meaningful guidance as to the amount of an award of punitive damages, and, unlike in *Haslip*, courts often defer to the discretion of the jury in setting those amounts. As noted above, *K-Mart Corp.* v. *Pearson*, 818 S.W.2d at 416-17, deferred to an award by a jury that had been instructed to award punitive damages "in your discretion." *Viking Insurance Co.* v. *Jester*, 836 S.W.2d 371, 379 (Ark. 1992), affirmed $250,000 in punitive damages awarded by a jury in an insurance case for damage to an automobile in which the plaintiff had received $1,000 in compensatory damages without any discussion of the appropriateness of that amount other than in comparison with the financial condition of the defendant. That result makes hollow the court's pronouncement in *Jester* that "we have always carefully scrutinized punitive damage awards." 836 S.W.2d at 379. In *Maintenance Equipment Co.* v. *Godley Builders*, 420 S.E.2d 199, 203-05 (N.C. App. 1992), after holding that "the amount of punitive damages . . . 'rests in the sound discretion of the jury although the amount assessed is not to be excessively disproportionate, . . .' " the North Carolina Court of Appeals made no separate analysis of the appropriate award. That court simply stated that "we conclude the trial court did not err by denying the motion for JNOV." 420 S.E.2d at 204.

Courts awarding large amounts of punitive damages further justify such awards based only upon the financial resources of the defendants, which raises concerns about prejudice against large corporations. In *Burke* v. *Deere & Co.*, 780 F. Supp. at 1237, the Court remitted a $50 million punitive damage award (in addition to compen-

satory damages of $600,000) to $28 million, with the observation that "to be effective . . . the exemplary damages awarded must be relatively large." *Accord FDIC* v. *W.R. Grace & Co.*, 691 F. Supp. 87 (N.D. Ill. 1988), *aff'd in part rev'd in part*, 877 F.2d 614 (7th Cir. 1989), *cert. denied*, 494 U.S. 1056 (1990) (court must look at financial status of defendant in order to ensure that punitive damages punish the defendant).[8]

Those holdings acquiesce in, if not encourage, unlimited jury power to take assets away from corporate defendants and ignore the warning issued by Justice Brennan in his concurring opinion in *Browning-Ferris* as to the fundamental unfairness of punishing a party based on its wealth. In contrast, other courts, heeding Justice Brennan's concerns, have held that the net worth of a defendant should only serve as a mitigating factor with respect to an award of punitive damages. In *Fraidin* v. *Weitzman*, 93 Md. App. 168, 211-16, 611 A.2d 1046, 1067-69 (Md. App. 1992), the Maryland Special Court of Appeals held that the net worth of a defendant was a "limiting factor" on punitive damage awards. *Vasbinder* v. *Scott*, 976 F.2d 118, 121-22 (2d Cir. 1992), took the financial condition of the defendants into consideration in mitigating punitive damage awards so that those awards would not "result in the financial ruin of the defendant . . . [or] constitute a disproportionately large proportion of the defendant's net worth." 976 F.2d at 121.

Moreover, some courts have held that the net worth of a defendant should only be considered as a limiting fac-

[8] *See also Maintenance Equipment Co.* v. *Godley Builders*, 420 S.E.2d at 203-05; *K-Mart Corp.* v. *Pearson*, 818 S.W.2d at 416-17.

tor, to be considered after determination of the other factors properly weighed in setting an award, such as the nature of the wrongful conduct and the amount of damage caused by that conduct. In announcing detailed procedures to meet the due process requirements as articulated in *Haslip*, the Supreme Court of Tennessee in *Hodges* v. *S.C. Toof & Co.*, 833 S.W.2d 896 (Tenn. 1992), required that punitive damages be considered in a bifurcated hearing, with evidence of the financial condition of the defendant not to be admitted in the liability hearing. *See also Oberg* v. *Honda Motor Co.*, 814 P.2d 517 (jury can consider net worth of defendant only after deciding that defendant has acted maliciously).[9]

The arbitrary nature of punitive damage awards makes the process of awarding punitive damages and their extent particularly suspect in commercial litigations such as the instant case. Courts have often noted the commercial setting of case as a reason for vacating or reducing punitive damages awards. In *Medical Mutual Liability Insurance Soc.* v. *R. Dixon Evander & Associates*, 92 Md. App. at 551, 609 A.2d at 369, the Court in remanding a $7 million punitive damage award observed that "the commercial dispute that triggered the [award]

[9] At least one court has observed that the use of a defendant's net worth as a mitigating factor on punitive damages may be constitutionally mandated under *Haslip*. *Mattison* v. *Dallas Carrier Corp.* held that the South Carolina law on punitive damages prior to *Haslip* was unconstitutional and noted that, under that law, "While . . . financial ability of the defendant is a relevant factor, . . . it is apparently not limiting." 947 F.2d at 100. The Fourth Circuit ordered a retrial under South Carolina procedures announced after *Haslip*, which include an instruction on "*Limitation based on ability to pay*." 947 F.2d at 110 (emphasis in the original.

was not 'very high on the scale of reprehensibility.' " In such settings, reckless and even malicious conduct does not endanger human lives or threaten physical injury, and the amount of damages actually caused or likely to be cause is readily quantifiable.[10] As noted in *Alexander & Alexander, Inc.* v. *R. Dixon Evander & Associates*, 88 Md. App. at 721, 596 A.2d at 711 in vacating a $12.5 million punitive damage award in a dispute over an exclusive insurance brokerage relationship:

> [the defendant] did not endanger the public health or safety; its conduct was not life-threatening to anyone. We accept . . . that it should be punished for, and others deterred from, engaging in [inappropriate] conduct. But nothing approaching $12.5 million is necessary to achieve either goal.

88 Md. App. at 721, 596 A.2d at 711. *Jacobs Manufacturing Co.* v. *Sam Brown Co.*, 792 F. Supp. at 1537, similarly vacated a $2.7 million award of punitive damages on a counterclaim arising out of the termination of a business relationship noting that "each year the defendant, through its highly sophisticated president with access to legal counsel, agreed in writing to the terms that would govern the business relationship with plaintiff." Under those circumstances, the Court held that the defendant had no claim for punitive damages based on

[10] The West Virginia Supreme Court below, without citing any evidence, speculated that "the type of *fraudulent* action *intentionally* undertaken by TXO in this case could potentially cause millions of dollars in damages to other victims." 419 S.E.2d at 889 (emphasis in the original). The Court below referred to no evidence of the amount of damages that petitioner actually did cause other than the $19,000 in actual damages awarded.

the termination of that relationship in accordance with the terms of those agreements.[11]

The negative effect of an arbitrary award of punitive damages upon commercial relations will far outweigh any benefit of such an award. By their very nature, being awarded on top of all damages necessary to make a plaintiff whole, punitive damages represent an economic windfall to the party seeking them. As the Seventh Circuit noted in affirming the vacation of a punitive damage award in *AMPAT/Midwest, Inc.* v. *Illinois Tool Works*, 896 F.2d 1035, 1044 (7th Cir. 1990), "AMPAT received a generous award of compensatory damages; all that has been taken away is a windfall." In *Mosser* v. *Fruehauf Corp.*, 940 F.2d at 88, the Fourth Circuit, similarly affirmed the denial of punitive damages based on negligent conduct and noted that " 'to the best of the legal system's ability, the plaintiff has been compensated for her loss; punitive damages would serve no purpose.' " *Accord Vasbinder* v. *Scott*, 976 F.2d at 121 ("because neither compensation nor enrichment is a valid purpose of punitive damages, an award should not be so large as to constitute 'a windfall to the individual litigant' "). Similarly, under Michigan law, punitive damages are only available to plaintiffs who have not been made whole by compensatory damages. *Thompson* v. *Paasche*, 950 F.2d 306, 314 (6th Cir. 1991) (affirming decisions of

[11] Other lopsided punitive damage awards arising out of commercial dealings include *Pennzoil Co.* v. *Texaco Inc.*, 481 U.S. 1, 4 (1987) ($3 billion), *Lightning Lube, Inc.* v. *Wilco Corp.*, 802 F. Supp. 1180 (jury awarded $50 million in punitive damages), *Tunis Brothers Co.* v. *Ford Motor Co.*, 952 F.2d 715 (jury award of $4 million in punitive damages), and the $533 million punitive damage award against the accounting firm of Coopers & Lybrand reported in The N.Y. Times, Feb. 18, 1992, at D5.

district court striking punitive damage award because actual damage award had made plaintiff whole).

In contrast, the unfettered awarding of punitive damages removes the predictability and ability to assess risk that stand as the foundation of any commercial system. Awards like those discussed herein increase the cost of doing business. Whether by being passed along in the form of marked-up prices or through diminution in competition resulting from the elimination of business entities that cannot afford the added costs of doing business, that cost is ultimately born by consumers. As Judge Friendly predicted in *Roginsky* v. *Richardson-Merrell, Inc.*:

> [T]he apparent impracticability of imposing an effective ceiling on punitive awards . . . may result in an aggregate which, when piled on large compensatory damages, could reach catastrophic amounts. If liability policies can protect against this risk, as several courts have held, the cost of providing this probably needless deterrence . . . is passed on to the consuming public; if they cannot, as is held by other courts and recommended by most commentators, a sufficiently egregious error as to one product can end the business life of a concern that has wrought much good in the past and might otherwise have continued to do so in the future, with many innocent stockholders suffering extinction of their investments for a single management sin.

378 F.2d at 841 (footnote omitted).

A striking example of that very result was the cataclysmic $10 billion award (including $3 billion in punitive damages) in *Pennzoil Co.* v. *Texaco Inc.*, 481 U.S. 1, 4 (1987). That award was settled by a transfer of substantial assets from Texaco Inc. to Pennzoil Co. The ultimate burden of that award thus fell on the shareholders of Texaco, who had nothing to do with the allegedly wrongful conduct supposedly being punished in that case, not the management or the parties responsible for the allegedly wrongful conduct. That award therefore did not even serve the purpose of punishment or retribution, but arbitrarily awarded one oil corporation (Pennzoil) a windfall out of the pockets of the innocent shareholders of another (Texaco).

POINT III

THIS COURT SHOULD SET FORTH THE MINIMUM REQUIREMENTS OF DUE PROCESS IN CONNECTION WITH THE AWARDING OF PUNITIVE DAMAGES

In light of the failure of the courts of West Virginia and other states to follow *Haslip* as noted above, this Court should make clear what due process requires in connection with punitive damage claims. Although this Court noted in *Haslip* that "we need not, and indeed we cannot draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case," 111 S. Ct. at 1043, this Court should at least give a general indication of the parameters within which punitive damage awards are constitutionally acceptable. *Haslip* mandated that punitive damage awards be "not grossly out of proportion to the severity of the effects and have some understandable to compensatory damages." 111 S. Ct. at 1045. What is

lacking below and in the other decisions that do not reflect the due process considerations of *Haslip* is a firm understanding as to what constitutes an award "grossly" out of disproportionate to the conduct to be punished or an "understandable" relationship to compensatory damages.[12]

Although a punitive award that eliminates the profitability of wrongful conduct may also pass constitutional muster, such an award, however, would present difficulties in litigation not involving all of the parties injured by the wrong conduct. Absent such a limitation, a court considering an award of punitive damages in favor of one plaintiff arising out of conduct that may have injured other parties would face the impossible dilemma of exposing the defendant to punitive liability many times the profitability of the wrongful conduct and permitting one plaintiff to obtain windfall punitive damages as opposed to other parties similarly situated, as was noted by Judge Friendly in *Roginski*, 347 F.2d at 838-42.

[12] Although this Court in *Haslip* rejected the argument that the punitive damage award was "much in excess in of the fine that could be imposed for insurance fraud" because of the possibility of imprisonment for insurance fraud as well, 111 S. Ct. at 1046, the potential for imprisonment should not preclude a comparison between the amount of punitive damages and the criminal damages. The amount of potential imprisonment for a particular offense varies with the severity of that offense, just as with the level of a fine. Although not offering a precise mathematical analogy, the potential amount of imprisonment for conduct in question does not preclude the use of applicable criminal penalties as a general measure of the severity of the offense and thus may serve as a reference for the appropriate amount of punitive damages.

In addition, due process prevents the use of punitive damages as a means of destroying a defendant. *Mattison* v. *Dallas Carrier Corp.*, 947 F.2d at 100, 110. Many courts, in awarding punitive damages, have held as a matter of common law that punitive damages may not be used to ruin a defendant. *Fraidin* v. *Weitzman*, 93 Md. App. at 211-16, 611 A.2d at 1068-70; *Vasbinder* v. *Scott*, 976 F.2d at 121; *Herman* v. *Sunshine Chemical Corp.*, 608 A.2d 978 (N.J. App. 1992) (remanding punitive damage award to jury for consideration as to defendant's financial condition to pay). As a result, the constitutional limit of an award of punitive damages should also provide that any award of punitive damages be within the ability of the defendant to pay.

Two other due process requirements would fairly remedy the errors below. First, as proposed by Justice O'Connor in her dissenting opinion in *Haslip*, punitive damages should be awarded from a bifurcated proceeding after the primary liability of the defendant has been established. *Pacific Mutual Life Insurance Co.* v. *Haslip*, 111 S. Ct. at 1064. Such a bifurcation would ensure that a jury could not be prejudiced by the wealth of a defendant in assessing liability or by the introduction of "bad acts" otherwise irrelevant to a showing of liability to show the malicious level of conduct necessary for the imposition of punitive damages. Moreover, in punitive damage schemes under which the jury is required (whether as a matter of state or constitutional law) to decide based upon a standard of proof higher than a preponderance of the evidence, potential jury confusion will be omitted.[13]

[13] This Court in *Haslip*, while noting its approval of the requirement that punitive damages only be awarded based upon clear and convincing evidence as a matter of policy held that due

Courts have often bifurcated punitive damage proceedings on their own accord. *See Smith* v. *Lightning Bolt Productions, Inc.*, 861 F.2d 363, 373-74 (2d Cir. 1988) ("since it often would be prejudicial to a defendant to attempt to litigate its financial condition during the trial on issues of liability and compensatory damages, the preferred method of accommodating the various interests is to delay trial as to the amount of punitive damages until the usual issues of liability and compensatory damages have been tried, along with the matter of whether the defendant's conduct warrants any award of punitive damages at all"). Moreover, *Hodges* v. *S.C. Toof & Co.*, 833 S.W.2d at 901, in response to *Haslip*, held that punitive damage proceedings were required to be bifurcated under Tennessee law in order to satisfy the due process requirements of *Haslip*.

Finally, this Court should expressly hold that due process protects a party against the use of that party's net worth to prejudice a jury. The opinion and the result below reflect a bias against petitioner and against institutional corporations that establishes beyond doubt that petitioner did not receive a fair hearing. Such bias is the antithesis of due process. To eliminate such bias, and the potential for juries to "run wild" with punitive damage awards against corporate defendants, this Court should reiterate that the net worth of a defendant cannot be used as the sole factor in setting an award of punitive dam-

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process did not require such a standard of proof with respect to the Alabama punitive damages law at bar in that case in light of the detailed judicial scrutiny of a jury award at the trial and appellate levels. 111 S. Ct. at 1046 n.11. That holding, of course, does not preclude the possibility that a higher standard of evidence might be constitutionally required under systems in which courts are not required to offer the same degree of judicial scrutiny.

ages, but that awards must have some rational connection with the nature and severity of the conduct being punished and the harm caused by that conduct.

CONCLUSION

For the reasons set forth above, the opinion of the Supreme Court of Appeals of West Virginia should be reversed.

Dated: January 22, 1993

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